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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

RESPONDENT'S PETITION FOR REHEARING

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RESPONDENT'S PETITION FOR REHEARING

Respondent respectfully petitions the Court to set aside the opinion and judgment rendered herein on April 5, 1971 and to grant him a rehearing for the following reasons:

1. The writ of certiorari granted by this Court was not limited to a particular question. One of the questions presented which was contained in the government's petition for writ of certiorari was as follows:

> "Whether under the ruling in **Katz v. United States**, 389 U.S. 347, the district court should have excluded testimony by federal agents as to conversa-

> tions between petitioner and an informant which the agents overheard by means of an electronic device carried by the informant, **with the informant's consent,** but without obtaining a warrant'' (emphasis added).

As shown by respondent in his Brief in Opposition and in his brief on the merits, the record in this case does not support the proposition that the informant voluntarily consented to the electronic eavesdropping. And, as recognized by Mr. Justice White in the majority opinion, the Court of Appeals did not purport to make a finding of whether the informant voluntarily consented to the eavesdropping, although said issue was raised in that Court. We submit that this Court should rehear the case, decide the consent issue and not allow the instant important constitutional question to be decided on hypothetical and unsupported facts.

Failure to rehear this case will be an open invitation for Court of Appeals to decide and present to this Court, constitutional questions which are not supported by the record and therefore need not be decided by this Court. At a minimum, this Court should order the Court of Appeals to consider and decide the issues previously not decided by said Court, including the consent issue. Failure to review this case on the record would mean that respondent will go to jail for almost 25 years without the constitutional issues **presented in the record** ever being reviewed and decided by an appellate court. Such a result is untenable!

Additionally, if this decision stands, law enforcement officers all over the country will be free to violate state criminal laws and to coerce people into being electronically bugged informants and spys for the purpose of obtaining information desired by the police. Without any judicial safeguards, the desired information may or may

not be obtained from a person suspected of criminal activity. Such a result or even the **threat** of such repression is untenable and warrants the exercise of this Court's supervisory powers to review same.[1]

2. As explained by Mr. Justice Harlan, the majority's holding imposes on all citizens the risk of electronic eavesdropping without the minimum protection of a warrant or judicial safeguards. For now, all citizens must now measure their words more carefully, resulting in that communications will be inhibited. We must all now expect that our conversations are being transmitted and transcribed. This result is untenable for all persons count on the obscurity of off-the-cuff remarks which are protected by the very fact that our audience is limited. Now, as a result of the majority opinion, these values are sacrificed at the whim of police officers and a willing assistant or informant.

Criminals aren't the only ones that now run the risk of the unknown eavesdroppers, but every law-abiding member of society is subjected to the same risk. Thus, any informant working for federal or local police officers, who **listens** to a congressman, Judge, civil rights leader, military leader, political candidate or housewife, may now transmit and record said statement or conversations, without any judicial controls whatsoever. There are now no safeguards. Members of the House of Representatives, United States Senators, political candidates, critics of the present or future members of our country's executive branch of government and all law abiding citizens now know that every word they speak could legally be transmitted, recorded and preserved for future use at the whim

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[1] Even if such conduct does not violate the Fourth Amendment, surely it is a more serious threat to our liberties than a technical "trespass". Thus, since this case involves a federal prosecution, this Court should prohibit electronic surveillance involved here in the exercise of its supervisory powers.

of the listener and any police officer. This clearly restricts freedom of speech and expression.

Subsequent to the time of oral argument in this case, some Congressmen and Senators have criticized the F.B.I. for its electronic eavesdropping activities. Although these men are public officials and therefore would normally expect a certain amount of invasion of their privacy, they apparently are of the opinion that innocent persons are threatened by such invasion or threat of invasion of privacy. The government disputes charges that they are using electronic surveillance except to investigate suspected crimes. This may or may not be true. If this is so, however, then why not at least require judicial supervision? Why doesn't our executive branch want judges to supervise the electronic eavesdropping? These questions are still unanswered.

Is it not within the realm of possibility that some federal, state, or local law enforcement personnel, many of whom are political appointees, might use this unrestricted power to spy on political opponents for the mere purpose of obtaining and preserving facts that might later become politically or otherwise embarrassing to the "bugged" victim? As Mr. Justice Douglas stated in his dissenting opinion, "Must everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world?" (Dis. Op. 9). Although most law enforcement personnel are honest, hardworking, dedicated men and women, some have abused their privileges and power in the past and probably will do so in the future. Thus, the important consideration is that such personnel must not be given such unrestricted powers that the freedom of all law-abiding citizens is threatened.

We submit that the majority's opinion does permit law enforcement personnel; good or bad, federal or state, to

threaten the constitutional rights of all citizens. Why? The government claims that it is necessary in the interests of better law enforcement. But, as explained in the dissenting opinions, this Court could still permit eavesdropping and keep a free society and prevent the clear and present dangers of a police state by letting the judiciary take part in seeing to it that innocent and law abiding citizens are not the victims of oppression. The **threat** of **unrestricted** electronic eavesdropping, as condoned by this Court in its majority opinion, clearly strikes the fear into many law abiding citizens that a police state is now a clear possibility. As time goes by, this fear could become a reality.

3. The majority opinion without specifically stating so, in effect overrules many prior decisions of this Court that have upheld the importance of a determination by a neutral magistrate that probable cause exists, prior to a search and seizure. See **Chimel v. California**, 395 U.S. 752; **Wong Sun v. United States**, 371 U.S. 471. In those cases and cases cited therein, it was held that any warrantless searches without prior judicial approval must be conducted under such "exceptional" circumstances before the government can validly claim an exemption from the general rule that requires the obtaining of prior judicial approval. We submit that this case should be reheard to determine the effect of the instant ruling on the many prior decisions of this Court on this issue.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for rehearing be granted and upon such rehearing the judgment below should be affirmed. In the alternative, and at a minimum, we submit that this Court should remand the case to the Court of Appeals with

specific instructions for it to rehear the case and decide the issues previously raised on appeal in that Court (including the issue of voluntary consent), but were not decided.

Respectfully submitted

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The undersigned counsel respectfully represents in behalf of the respondent that the foregoing Petition for Rehearing is filed in good faith and not for the purposes of delay.

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